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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1944

## No. 495

UNITED STATES OF AMERICA,
*Petitioner,*

v.

COMMODORE PARK, INCORPORATED,
*Respondent*

## BRIEF SUBMITTED ON BEHALF OF RESPONDENT

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### PRELIMINARY

Reference is initially made to the opinion of the United States District Court, Eastern District of Virginia, at pages 11 to 30 inclusive of the transcript of record. Its findings of fact pertinent to this cause are consolidated at pages 27 and 28, and its conclusions of law at pages 42 and 43. The opinion of the Circuit Court of Appeals for the Fourth Circuit is reported in 143 F. (2d) 720, and will be found at pages 36 to 44 of the transcript of record.

We think the question presented is a great deal broader than it has been stated in the brief for petitioner, and that comprehension of the scope of the question depends upon a clear understanding of the facts.

## STATEMENT OF FACTS

Beginning in 1940 the Navy Department pr
ceeded to enlarge its Naval Operating Base at Norfol
and particularly the aviation shore facilities at t
Naval Air Station which was then located on the We
side of Mason's Creek and the South side of Willoughb
Bay. In aid of this project the United States proceede
to condemn all the remaining land on the West si
of Mason's Creek (lying to the South of the land whi
it already owned) to the headwaters thereof, and near
all of the land on the East side of the Creek, and t
land on the East side of Willoughby Bay North
the mouth of the Creek, leaving only the land of t
respondent and six smaller parcels, none of which we
condemned. Condemnation proceedings took place
1940, 1941 and 1942, and included some two thousan
acres of land. While these proceedings were pendi
the Navy Department contracted with Virginia Eng
neering Company for a project entitled "Aviati
Shore Facilities", which called for the constructi
of "bulkheads, dredging, and fill, and preparation
landing field", as well as the erection of certa
structures, changes in the location of roads, pipe lin
and the like, at a total estimated cost of $13,700,000.0
A part of the work to be performed under the contra
was the dredging of Willoughby Bay from its th
existing depth to depths of ten to fourteen feet belo
mean low water so as to provide sufficient depths f
large patrol sea planes (R. 16). Willoughby Bay w
closed to navigation for vessels other than Naval cra
and Mason's Creek was permanently closed to a
navigation. In the course of the dredging operatio

18,000,000 cubic yards of mud and silt were taken from the bed of Willoughby Bay and deposited in the creeks and the condemned areas South of Willoughby Bay. These deposits resulted in the reclamation of several hundred acres of land which had theretofore been parts of the beds of Mason's and Theleball's Creek (R. 16). The land thus reclaimed was incorporated in the Naval Operating Base as a permanent part thereof. At the mouth of Mason's Creek where it entered Willoughby Bay under natural conditions, and where the channel had been about 550 feet wide, the Creek was filled from side to side to a height equal to the highest point of the adjoining high land, and the Creek was filled from that point Southwardly to a distance of approximately one and one-half miles to a point near the respondent's land where a retaining wall was constructed. Immediately opposite the respondent's land a pond or sink was left. The results to this respondent are clearly summarized in the findings of fact of the District Court at Record page 24, in the following language:

> "The shores on the westward and northwestward sides of plaintiff's land bordered on the navigable part of Mason's Creek and were high, firm, sandy shores, slanting down gradually between high and low water marks. The waterfront lots on that side before the filling and closing above described, were desirable for waterfront residential property. The presence of navigable water and the riparian rights such as fishing, boating, and the like, incident to the land, contributed very substantially to both its intrinsic and fair market value.

By filling and closing Mason's Creek of plaintiff's riparian rights were permaner taken. The part of Mason's Creek not fil was converted into a lake without any out sewers and surface drainage emptied ther and the water became stagnant and filthy. T water used in conveying through pipes dredged materials from the Bay to the parts Mason's Creek filled, overflowed the bulkhe and dykes, and carried great quantities of m and silt into the parts of Mason's Creek filled, and much of it settled along the sh and to a substantial depth on plaintiff's la lying between high and low water marks, a permanently converted that land into unde able spongy mud bottom."

For these results the respondent was awarded recovery of $7,870.00, with interest at 4% from S tember 1, 1941 (R. 30). The award was confirmed the Circuit Court of Appeals (R. 45).

## DECISIONS BELOW

The District Court held that the project was in aid of navigation and that the damaging consequen to respondent did not result from Governmental act in aid of commerce, or in Governmental action in of navigation as an incident of commerce (R. 29)

The Circuit Court of Appeals held that dredging operations in Willoughby Bay did relate commerce, and navigation as an incident thereof, that the deposit in Mason's Creek of the mater dredged from Willoughby Bay had no relation navigation or commerce; that the deepening of one body of water and the fill in the other were

integral and related parts of a single enterprise (R. 42); that the filling (and closing) of Mason's Creek did not in anyway serve the interest of commerce or navigation (R. 43). Accordingly, it affirmed.

## THE QUESTION PRESENTED

Petitioner presents the question as though the only damage done to respondent was the deprivation of its access to navigable water. Its brief suggests the picture that this cause is comparable to one where governmental authority, motivated only by an intention to improve navigation in a stream which borders the riparian owner, in furtherance of that object has erected a structure between the fast land and the channel of the stream, or has diverted the location and course of the channel. Such is by no means the true picture. The facts—

(a) That the stream in its natural condition no longer exists, since sixty to seventy percent of its bed has been wholly filled, and the remainder partially filled (R. 25), and nothing remains of it except a stagnant pond which is adjacent to respondent's land (R. 24); and

(b) That the respondent's shores which it owns in fee (R. 12), and which were "high, firm, sandy shores", are "undesirable spongy mud bottom"; and

(c) That its adjoining fast land, formerly "desirable for waterfront residential property" and which formerly enjoyed a pleasant perspective, and the privilege of "fishing, boating, and the like, incident to the

land", is now inland property in public contempla
bordered by a stagnant and unhealthy pool,

are nowhere made apparent.

By reason of the changes which the Navy De
ment effected in the natural course of the stream
the invasion of respondent's shores as an inc
thereof, the value of respondent's land, which form
bordered on the stream, has been adversely affe
and "its riparian rights have been permanently ta
Since the riparian rights so taken are property r
and valuable, and they are inseparately linked t
fast land which was formerly waterfront proper
might be more accurate to say that the taking o
riparian rights is a taking of the property to the e
to which its value is diminished. The taking has
for a public use. The right to just compensation n
sarily follows unless the circumstances surroundin
taking bring it within some exception for whic
Government is not required to pay.

## WHAT IS THE NATURE OF THE RIPARIAN RIGHTS TAKEN FROM RESPONDENT?

In Farnham on WATERS and WATER RI
Vol. 1, these principles are stated:

> "In all states where the common law
> not been changed, the owners of land abu
> on bodies of water are accorded certain r
> by reason of their adjacency which are diff
> from those belonging to the public gene
> and are comprehended within the general
> 'riparian rights'". (P. 278).

"* * * the principles involved * * * accord the owner of riparian land the right to have the water remain in place, and to retain, as nearly as possible, its natural character. * * * The riparian owner is also entitled to have his contact with the water remain intact. This is what is known as the right of access, and includes the right to erect wharves to reach the navigable portion of the stream." (P. 279).

"In addition to the above there are certain commercial advantages connected with a favorable situation upon the bank of a navigable body of water which tend to enhance the value of the estate. These rights come to the riparian owner by nature, and in justice he should not be deprived of them by the public without compensation any more than he should of other natural rights which are his because of the character or situation of his property." (P. 280).

"The right of using the water and access to it is generally regarded as a property right of which the riparian owner cannot be deprived for the private use of another nor for public use, without receiving compensation." (P. 282).

In the early case of *Bowman, et als v. Wathen,* 2 McLean 376, Fed. Case No. 1740, in the opinion of the Court at page 1079, it is said:

"He (the riparian owner), has the right of fishery or ferry, and every other right which is properly appurtenant to the soil, but he holds every one of these rights by as sacred a tenure as he holds the land from which they emanate. The State cannot, either directly or indirectly, divest him of any one of these rights except by a constitutional exercise of the power, to appropriate private property for public purposes. * * *

"The principles laid down are of com
right. In this country they are everywhere
ognized. They belong as well to the civi
the common law."

**ARGUMENT AND CITATION OF AUTHORITIE**

It must be remembered that the dominant po
of the Federal Government over navigable stre
emanates from Article I, Section 8, Paragraph
the Constitution, and is to be exercised for the assist
or regulation of commerce. The improvement of n
gation is but an incident of the assistance or regula
of commerce.

In *United States v. Appalachian Electric Po
Company*, 311 U. S. 377, 426, this court said:

"In truth the authority of the United S
is the regulation of commerce on its wa
Navigability, in the sense just stated, is b
part of the whole. Flood protection, waters
development, recovery of the cost of impr
ments through utilization of power are like
parts of control. As respondent soundly arg
the United States cannot by calling a pro
of its own 'a multiple purpose dam' give to i
additional powers, but equally true the res
dent cannot, by seeking to use a navigable wa
way for power generation alone, avoid
authority of the Government over the stre
The authority is as broad as the needs of C
merce."

While Congress in the exercise of the powe
alter the natural condition of navigable waters
the needs of commerce may adopt, in its judgm

any means having some positive relation to the control of navigation and not otherwise inconsistent with the Constitution, it may not arbitrarily destroy or impair the rights of riparian owners by legislation (nor by action without legislation) which has no real or substantial relation to the control of navigation or appropriateness to that end. It is to be noted at the outset that neither the filling of Mason's Creek, nor even the dredging of Willoughby Bay, resulted from the adoption by Congress of a program which had a relation to the needs of commerce or the improvement of navigation in aid thereof, nor did it originate with the Secretary of War or Chief of Engineers to whom are delegated the general responsibility for changes supporting the needs of commerce. There was never any claim or pretext that such was the origin of this project, but on the contrary it resulted solely from the determination of the Navy Department that certain additions to aviation shore facilities were requisite, and the deepening of the water in Willoughby Bay was but one incident of such major purpose.

The nature of the riparian rights which were taken from this respondent are to be determined by the laws of the State in which the property is located. They are property rights. *Yates v. Milwaukee,* 10 Wall. 497, 504; *Mullins v. Morgan,* 176 Va. 201; *Hite v. Town of Luray,* 175 Va. 218.

To conclude that such taking under the circumstances in this case has a direct relation to the needs of commerce or improvements in navigation for the aid thereof, is to deny the obvious.

In a comprehensive conclusion of the District Court it was held that the project which resulted in the elimination of Mason's Creek was for the purpose of national defense, and not for the purpose of aiding navigation or commerce. If that conclusion is sound, further discussion serves no useful purpose since it is everywhere conceded that the Federal Government must pay for any taking of private property or property rights in furtherance of national defense. In reaching its conclusion the District Court looked to the object designed to be accomplished, and from the decided cases, even those cited by petitioner, this would seem to be the controlling circumstance. On the other hand the Circuit Court of Appeals took the view that because one portion of the project contemplated the deepening of the waters of Willoughby Bay for the convenience of Naval seaplanes, the fact that the result to be attained at that location was the deepening of the waters, necessarily made that portion of the project an undertaking in aid of navigation in legal contemplation, but that the remaining portion of the project, that is, the deposit in Mason's Creek of the materials dredged from Willoughby Bay, had no relation to navigation or commerce. It said—

> "The deepening of the one body of water and the fill in the other were not integral and related parts of a single enterprise, as happened, for example, in South Carolina v. Georgia, 93 U. S. 4, where one of two channels of a stream was closed to the detriment of a riparian owner in order to improve the navigability of the other channel. * * * In short, the closing of the stream did not in any way serve the interests of commerce or navigation."

We agree that the closing of Mason's Creek and the taking of this respondent's property rights did not in anyway serve the interest of commerce or navigation, but we contend further that anything which was done to accomplish the result (including the dredging of Willoughby Bay) was never designed or intended to serve the interests of commerce or navigation, nor was it effective to that end. If the enlargement of the Aviation Shore Facilities had have contemplated the filling of Willoughby Bay (as well as Mason's Creek), instead of the deepening of Willoughby Bay, no one would contend that such an undertaking was in aid of commerce. Here, several hundred acres lying between the Southern line of Willoughby Bay and respondent's property on the East side of Mason's Creek near its headwaters, were reclaimed, and were taken into the confines of the Naval Operating Base, and are not now, and presumably never will be, available for the passage of vehicles used in commerce. This area so reclaimed covered the whole location where the mouth of the creek had been. It would seem extremely illogical to contend that merely because a water course is deepened at one point for purposes having no relation to commerce over it, the possibility that commercial vessels may pass over that water course in the future exonerates the Government from liability for the taking of riparian rights at the point where the dredged material is deposited. The taking is not occasioned by the deepening, but entirely by the deposit.

A careful analysis of each of the decided cases bearing on the subject under discussion is essential to an understanding of the scope of the decisions.

**Discussion of Cases Apparently Adverse—**

In *Gibson v. United States,* 166 U. S. 269, the Government had built a dyke in the Ohio river and confined the water to the main channel, the project having as its only object the improvement of navigation in commerce along the river. The dyke prevented the free ingress and egress of boats to plaintiff's landing at certain times of the year. The court found that the access of the riparian owner was not cut off but merely made more difficult, and that she was not otherwise damaged. As to the damages which she did sustain, it was said that these were consequential to the Government's dominant power( and obligation) for the use of the public in commerce.

In *Scranton v. Wheeler,* 179 U. S. 141, the Government constructed a pier in the water (but not touching the property which plaintiff owned in fee) in such a manner as to interfere with this riparian owner's access to the deep water of the stream. The question is presented at page 153, as follows:

> "The vital question therefore is the one heretofore mentioned, namely, whether the prohibition in the Constitution of the United States of the taking of private property for public use without just compensation has any application to the case of an owner of land bordering on a public navigable river whose access from his land to navigability is permanently lost by reason of the construction of a pier resting on submerged lands away from but in front of his upland, and which pier was erected by the *United States not with any intent to impair the rights of riparian owners but for the purpose*

*only of improving the navigation of such river."* (Italics ours).

A circumstance of importance bearing on the decision is set forth at page 164:

> *"When erecting the pier in question, the Government had no object in view except, in the interest of the public, to improve navigation.* It was not designed arbitrarily or capriciously to destroy rights belonging to any riparian owner. What was done was manifestly necessary to meet the demands of international and interstate commerce. In our opinion, it was not intended that the paramount authority of Congress to improve the navigation of the public navigable waters of the United States should be crippled by compelling the Government to make compensation for the injury to a riparian owner's right of access to navigability that might incidentally result from an improvement ordered by Congress." (Italics ours).

The effect of the decision is further limited by the facts (a) that the object in view was to improve navigation in the interest of the public, and (b) that the injury suffered was only the deprivation of access to deep water. In criticising this case, Mr. Farnham says at page 382 of his work on "Waters and Water Rights":

> "The court entirely ignores the cases which have established the right of access as a property right, and relied on Sage v. New York and Gibson v. United States, the facts in which, as has been seen, do not support the decision, so that it is based entirely on dicta and departs from the doctrine of Yates v. Milwaukee, 10

> Wall. 497, Dutton v. Strong, 1 Black 25, and St. Paul & P. R. Co. v. Schurmeir, 3 Wall. 372. In the light of the character of the rights of the riparian owner and of the purpose of the constitutional provision that private property shall not be taken for public use without compensation, there is no doubt that the doctrine of Scranton v. Wheeler is unsound. * * * So, Mills v. United States, 46 F. 738, 12 LRA 673, held that the rights of a riparian owner in the ebb and flow of the tide in a navigable river are subordinate to the Government's control of the waters for the purposes of navigation; and that the confinement of the waters for the purposes of scouring and deepening the channel, whereby canals and ditches used to drain rice fields are flooded and rendered unavailable, is damnum absque injuria. But that case is overruled by United States v. Lynah, 188 U. S. 445. * * * The doctrine absolutely subordinating the right of the riparian owner to the public right to improve the water is thus seen to be limited to so few cases, and is so opposed to the overwhelming weight of authority, that it can have no application outside of the courts which are committed to it."

Under the line of decisions of which *United States v. Chandler-Dunbar Water Co.*, 229 U. S. 53, is the leading case, and *United States v. Appalachian Electric Power Co.*, 311 U. S. 377, a more recent illustration, it is uniformly held that private owners of *obstructions* which have been placed in navigable streams are not entitled to compensation for the removal or elimination of these obstructions in the improvement of navigation. Those cases are not similar to the question here pre-

sented because (a) the project in which the removal results has as its direct object the benefit of commerce, and (b) the obstructions (property) for which compensation is sought have not come in being ex jurae naturae as an incident to the ownership of the abutting land; and (c) anyone placing an obstruction (such as a pier, abutment, dam, lock, or similar structure) in a stream or water course, either under State or Federal permissive authority, is chargeable with knowledge that the United States has the power to, and may at any time, change the condition of that stream to assist the needs of commerce. Any property right which such person acquires in a structure created by him in the stream is subject to the superior right of Government when exercised for the purposes stated. In these cases no property rights which existed solely as an incident of the ownership of the abutting land were involved, and in each the act which occasioned the damage was unavoidable if navigation was to be improved.

Again, as in *United States v. Chicago M. St. P. & P. R. R. Co.*, 312 U. S. 592, a riparian owner who has constructed an embankment or railroad line, earthwork, or other structure on his shore between high water mark and low water mark, is not entitled to compensation when changes in the stream, having as their direct object the aid of navigation, result in flooding such structure. This is because the property right which the riparian owner has in the area between high water mark and low water mark is no stronger than the property right which he has in the bed of the stream. His injury is to a structure which he has created and

which did not exist as an incident to his ownership of the property abutting on the stream, and the right to retain the property which he has thus created is subordinate to the power of Government exercised to meet the needs of commerce in the public interest.

**Cases Upon Which Respondent Relies**

It would seem to be well settled by the decisions of this Court that even where the activities of the United States have as their direct object the improvement of navigation for the benefit of commerce, yet if such activities (as dredging or the erection by the Government of dams, locks and abutments) result in changes in the natural condition of a navigable stream, so that a riparian owner is deprived of the property rights which he holds as an incident of his ownership of land which abuts on such stream in its natural condition, the damage which he thereby sustains is a taking of his property in the public interest for which just compensation must be paid. *United States v. Cress*, 243 U. S. 316; *Jacobs v. United States*, 290 U. S. 13. See, also, *Goodman v. United States* (CCA 8th, 1940), 113 F. (2d) 914.

The case of *United States v. River Rouge Imp. Co.*, et al., 269 U. S. 411, is of peculiar interest and primary importance as a precedent. There Congress made an appropriation for improvement of navigation in the Rouge River in Michigan, in aid of commerce, and the United States proceeded by condemnation to acquire certain property of riparian land owners in order to widen the stream. The quantity taken from the riparian owners did not constitute the whole of

the tracts owned by them, and the United States contended that the remaining property was benefitted by this widening and improvement of the stream. It asked the trial court to charge the jury that the value awarded for the property taken must be reduced by the value of such benefit. The trial court recognized the right of the United States to the deduction of such special benefits, but in charging the jury stated that the Government had absolute power of control over navigable streams, and the right to deprive any riparian owner of all access to the navigable portion of the stream; that since the right of access was subject to the absolute power of control by the Government the jury could not make any deduction for benefits on the theory that the improvement would increase the value of any property right in connection with the access to or use of the river, or bring the owner any new or different right of access and use for purposes of navigation, and that the jury should keep "always in mind the uncertainty of securing from the Government the privilege to enjoy these advantages, and the limited character of whatever advantages may be so secured." The United States excepted to the charge and took the appeal, asserting that its rights were not absolute but qualified, and limited to the control for the purpose of improving navigation for the benefit of commerce, and *that where the accomplishment of this purpose went beyond the removal of obstructions from the stream the owner was entitled to compensation for any property right of which he was deprived*, but such compensation was subject to reduction by the value of any benefit conferred on property which remained in him. It was

so held. In an opinion by Mr. Justice Sanford, this Court said:

> "This right of a riparian owner, it is true, is subordinate to the public right of navigation, and subject to the general rules and regulations imposed for the protection of such public right. And it is of no avail against the exercise of the absolute power of Congress over the improvement of navigation, if Congress determines that the continuance is detrimental to the public interest in the navigation of the river. United States v. Chandler-Dunbar Water Power Co., 239 U. S. 62, 57 L. ed. 1075, 1078, 33 Sup. Ct. Rep. 667.
>
> "The right of the United States in the navigable waters within the several states is, however *'limited to the control thereof for the purposes of navigation.'* Seattie v. Oregon & W. R. Co., 255 U. S. 56, 63, 65 L. ed. 500, 506, 41 Sup. Ct. Rep. 237. And while Congress, in the exercise of this power may adopt, in its judgment, any means having some positive relation to the control of navigation and not otherwise inconsistent with the Constitution, United States v. Chandler-Dunbar Water Power Co., 229 U. S. 62, 57 L. ed. 1075, 33 Sup. Ct. Rep. 667, *it may not arbirtarily destroy or impair the rights of riparian owners by legislation which has no real or substantial relation to the control of navigation or appropriateness to that end.* In Yates v. Milwaukee, 10 Wall. 504, L. ed. 986, it was said in reference to the rights of a riparian owner on a navigable stream: 'This riparian right is property, and is valuable, and though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired.' This language

was cited with approval in Illinois C. R. Co. v. Illinois, 146 U. S. 445, 36 L. ed. 1039, 13 Sup. Ct. Rep. 110." (Italics ours).

**Criticism of Other Authorities Cited By Petitioner—**

We do not think the following authorities cited by petitioner are apposite for the reasons here expressed.

In *Greenleaf Lumber Co. v. Garrison,* 237 U. S. 251, by making an appropriation for that purpose Congress determined to widen the channel of the Elizabeth River, in consequence whereof the Secretary of War caused the Port Warden's line to be re-established nearer inshore on the East side of the river, and then required the Lumber Company to remove from the bed of the river that portion of its pier (the outer end) between the old and new Port Warden's line. The subject property was an obstruction in the bed of the stream which had been placed there by the riparian owner. An inducing motive for widening the stream was to afford Naval vessels proceeding to the Portsmouth Navy Yard a wider area in which to turn. The Lumber Company claimed that because this was the motive it could not be required to remove its pier, but the project contemplated an improvement in navigation facilities available to and continuously used by commercial vessels of all types, as well as Naval vessels. The determination was that the change was required for the needs of commerce, and such determination had been made by Congress. The decision of the court, requiring the removal of the obstruction and recognizing that the owner was not entitled to any compen-

sation for its loss, was in no sense a departure from previously and subsequently announced principles.

*South Carolina v. Georgia,* 93 U. S. 4, is clearly distinguishable because there one of two channels in the same stream was filled to improve navigation in the other channel in that stream, as has been pointed out in the opinion of the Circuit Court of Appeals (R. 56); and for the further reason that in that case the only detriment to the riparian owner was in his use in navigation of a part of the stream.

*Bailey v. United States,* 62 C. Cls. 77, certiorari denied, 273 U. S. 751, in no sense presents a parallel situation. There the party seeking compensation was not even a riparian owner and had no property right in the natural condition of the watercourse, but he sought to recover for the value of oysters which he had placed in the bed of a navigable stream when those oysters were covered by deposit from a dredging operation. His right to have the oysters in the bed of the stream was acquired under lease of oyster ground from Virginia, and was servient to the right to remove or destroy an obstruction in widening or deepening the stream. In no sense is the case at bar in conflict with the Bailey case, nor is the decision of the Court of Claims a departure from the principles which have been here applied.

Petitioner cites the opinions of two past Attorney Generals, written respectively in 1899 and 1910, and published in 22 Op. A. G. 646 and 28 Op. A. G. 433, as authority for its position. We think these ex parte expressions are entitled to little weight With respect to the opinion reported in 22 Op. A. G. 646, the ma-

jority opinion of the Circuit Court of Appeals in this cause, in a foot note appearing in the Record at page 42, says:

> "There is no authority for the broad proposition that the United States has the absolute right to deposit material dredged from navigable waters in any other navigable waters within its control. A statement from the opinion of the Attorney General in 22 Opp. Atty. Gen. 649, seems to give support to such a rule, but only when separated from its context. It was made in support of the power of the United States to deposit material, which it had dredged from Lake Erie, in the Lake within eight miles of the City of Chicago notwithstanding the prohibitory provisions of a City ordinance. The Attorney General was merely deciding that the authority of the United States over the navigable waters of the Lake was superior to that of the municipality. No private riparian rights were involved."

## CONCLUSION

For the reasons stated herein we feel that the decision and judgment of the Circuit Court of Appeals for the Fourth Circuit in the case at bar are manifestly right and should be affirmed.

Respectfully submitted,

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# SUPREME COURT OF THE UNITED STATES.

No. 495.—October Term, 1944.

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|---|---|
| The United States of America, Petitioner, *vs.* Commodore Park, Incorporated. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit. |

[March 26, 1945.]

Mr. Justice Black delivered the opinion of the Court.

The United States dredged a tidewater navigable bay and deposited the dredged materials in a navigable arm of the bay called Mason Creek, thereby destroying its navigability, and impairing certain benefits alleged to inhere in the proximity of the land to a navigable tidewater creek. The broad question presented is whether the Fifth Amendment requires the government to compensate an owner of residential property contiguous to the creek, whose fast lands, though not physically invaded, were decreased in market value.

Commodore Park Inc., an owner of lands on the creek about a mile away from the filled-in segment, brought this suit in the District Court under the Tucker Act, 24 Stat. 505, 28 U. S. C. 41(20) for damages resulting from a "taking" by the government of its property for public use, in connection with a naval facilities expansion program. As the case comes to us,[1] the material findings, which we accept, are that the government (1) caused mud and silt to settle on that part of the land in question lying in the bed of what had been a navigable tidewater creek before the project was completed, and (2) destroyed the navigability of the creek, thereby

[1] In the District Court respondent also claimed that mud and silt had been cast on his fast lands. This part of the claim was denied by the District Court, and we need not consider it. With reference to it the Circuit Court of Appeals said: "This relief dredging gave rise to the additional claim on the part of the plaintiff that mud and silt had been deposited on its land, not only between high and low water mark but also above high water mark. But the District Judge disallowed this part of the claim as he found that no material damage had been suffered in excess of the benefit which the plaintiff had derived from the partial filling of low marshes, inlets and coves on its property. No appeal was taken by the plaintiff." United States *v.* Commodore Park, 143 F. 2d 720, 722.

depriving respondent of that part of the market value of its fast land attributable to its proximity and accessibility to a fresh tidewater creek in its natural and navigable state. The government's answer, so far as material to our decision, is that respondent's alleged ownership of the land between high and low water marks and its "riparian rights" of access to the navigable waters both were subordinate to the government's plenary authority over navigable waters of the United States, that its program was effectuated pursuant to that authority, and that consequently there had been no "taking" of "private property" within the meaning of the Fifth Amendment.

The District Court held that the entire project had no substantial relation to navigation or commerce, and found that the market value of the land lying between high and low water marks had been decreased by the mud and silt deposits, and that respondent's fast land had been reduced in value because of the loss of the riparian rights of access for navigation, fishing, boating, and the like. It accordingly rendered judgment for respondent "for the damages it . . . sustained as a result of the taking of its riparian rights and lands . . . ." The Circuit Court of Appeals unanimously agreed that the dredging operation was done in furtherance of navigation and commerce, but a majority held that the depositing of the dredged material in the creek was not in aid of navigation, and therefore affirmed the District Court. 143 F. 2d 720. Because it is important that the government's power to engage in projects in aid of navigation and commerce be clearly defined, we granted certiorari. 323 U. S. —.

A few additional facts drawn from the record will serve to clarify the issues.

In 1940, the respondent owned a residential real estate development in Norfolk, Virginia, located on the east side of Mason Creek, a navigable tidewater which extended inland about four or five miles from the navigable waters of Willoughby Bay. West of Mason Creek, and adjacent to Willoughby Bay, was located the Hampton Roads Naval Operating Base, which maintained a Naval Air Station with shore facilities for seaplanes. It was this station, which under the authority of Congress,[2] the Navy Department enlarged and improved. In order to provide suitable waters for

[2] 48 Stat. 957; 53 Stat. 590-592; 53 Stat. 757, 772-773.

the operation of large seaplanes, the Navy, acting in conjunction with the War Department, 30 Stat. 1121, 1151-1155, dredged Willoughby Bay to a depth of 10 to 15 feet below mean water mark. Additional lands, adjacent to the base, were bought or condemned by the government, on both the east and west sides of Mason Creek. The materials dredged from the bay were in part deposited in Mason Creek between the shores of lands owned by the government adjacent to the bay. By this process, the bed of Mason Creek was at that point, raised to the level of its shores, thereby becoming incorporated as an integral and useful part of the Naval Operating Base. This fill, reinforced by bulwarks, dykes and retaining walls, cut off the remainder of Mason Creek, along which respondent's land bordered, from any navigable outlet to Willoughby Bay and the sea. It also blocked off the tidal movements which previously had provided an element of freshness in Mason Creek's waters, thereby resulting in a standing and stagnant pool. This condition, at the request of property owners, was later alleviated by digging a channel in the stream's bed, and connecting it with the bay by a culvert, much smaller in area than the original bed. An iron grate, placed where the culvert emptied its waters into the bay, closed it to navigation. We must take it from the findings below that the size and construction of the culvert were inadequate to afford a completely free tidal movement, and that as a result, the waters of Mason Creek became "semi-stagnant", depriving them of the same freshness they had possessed before the work was done.

First. The judgment for respondent involves no physical invasion of its fast lands. Its property was more than a mile from the fill made in Mason Creek. The only land for which compensation was awarded because of mud and silt deposits was that part of the creek's bed between high and low water mark. That Virginia recognizes respondent's title to such land[3] cannot give respondent a right to compensation if its market value is impaired as a result of work done by the United States in the interest of improvement of navigation. *United States* v. *Chicago, M., St. P. & R. Co.*, 312 U. S. 592, 596-598, set at rest any remaining doubt concerning the dominant power of the government to control and regulate navigable waters in the interest of commerce,[4]

[3] Scott *v.* Doughty, 124 Va. 358; Hite *v.* Town of Luray, 175 Va. 218.

[4] United States *v.* Chandler-Dunbar Co., 229 U. S. 53, 60, 62, 68, 72; Scranton *v.* Wheeler, 179 U. S. 141, 163.

without payment of compensation to one who under state law may hold "technical" legal title (as between himself and others than the government) to a part of the navigable stream's bed.

Second. Nor does a riparian owner acquire a unique private right distinct from that held by all others, to have access to and enjoyment of navigable waters and to recover compensation from the government because deprived of that privilege by an authorized governmental change in a stream.[5] Respondent's property was always subject to a dominant servitude; it did not have a vested right to have this navigable stream remain fixed and unaltered simply because of the consequent reflected additional market value to adjacent lands. Whatever market value of riparian lands may be attributable to their closeness to navigable waters, does not detract from the government's "absolute" power[6] in the interests of commerce, to make necessary changes in a stream. In short, as against the demands of commerce, an owner of land adjacent to navigable waters, whose fast lands are left uninvaded, has no private riparian rights of access to the waters to do such things as "fishing and boating and the like", for which rights the government must pay.[7] Riparian rights of access to navigable waters cannot, as against the government's power to control commerce, be bought and sold.

Third. It is argued that the foregoing rule of governmental non-liability is inapplicable to this case. Since the Navy Department originated this plan with a view to improvement of shore facilities, we are asked to hold that neither the dredging in Willoughby Bay nor the deposit of the dredged material in Mason Creek bore any real or substantial relation to commerce or navigation. Such a holding was the basis of the District Court's judgment. The Circuit Court held that the dredging in Willoughby Bay was, but the deposit in Mason Creek was not, related to commerce or navigation. We cannot agree. The "fact that purposes other than navigation will also be served could not invalidate the exercise of the authority conferred, even if those

[5] Scranton *v.* Wheeler, *supra*, 159-160; Stockton *v.* Baltimore & N. Y. R. Co., 32 Fed. 9, 20.

[6] United States *v.* River Rouge Co., 269 U. S. 411, 419; Gilman *v.* Philadelphia, 3 Wall. 713, 724-5.

[7] Gibson *v.* United States, 166 U. S. 269; Scranton *v.* Wheeler, *supra*.

other purposes would not alone have justified an exercise of Congressional power." *Arizona* v. *California*, 283 U. S. 423, 457.

All the waters affected were navigable. The Constitution entrusted to Congress the responsibility of determining what obstructions may, or may not, be placed in such waters.[8] This power Congress may exercise itself or through its duly authorized agents.[9] Here, the War Department, selected by Congress to pass upon when and to what extent, navigable waters may be altered or obstructed, permitted, and actually supervised, the program accomplished. Even though cases might arise in which the courts would look behind the judgment of this specially authorized agency,[10] this is not such a case.

While this project touched two separate, although closely related bodies of navigable waters, and looked to improvement of shore, as well as water facilities, the entire program as to the waters was designed to achieve one closely integrated unit. That there were two bodies of navigable waters to which the one program related, does not detract from Congressional power as to either, for its powers are broad enough to justify one unified program for the connected body of waters to the end that commerce in general may be fostered.[11]

Thus, having power under the Commerce Clause to obstruct navigation by depositing the dredged soil in Willoughby Bay, the government was likewise authorized to deposit in Mason Creek for the same purpose. There is power to block navigation at one place to foster it at another.[12] Whether this blocking be done by altering the stream's course, by lighthouses, jetties, piers, or a dam made of dredged material, the government's power is the same and in the instant case is derived from the same source—its authority to regulate commerce. Since the judgment awarded

[8] United States *v.* Chandler-Dunbar W. P. Co., supra, 62-67; Pennsylvania *v.* The Wheeling & Belmont Bridge Co., 18 How. 421.

[9] Union Bridge Co. *v.* United States, 204 U. S. 364, 377-388; Greenleaf Lumber Co. *v.* Garrison, 237 U. S. 251, 268; South Carolina *v.* Georgia, 93 U. S. 4, 13.

[10] See Greenleaf Lumber Co. *v.* Garrison, *supra*, 268; United States *v.* Appalachian Electric Power Co., 311 U. S. 377, 424; Arizona *v.* California, 283 U. S. 423, 456.

[11] United States *v.* Appalachian Power Co., *supra*, 426-437; Oklahoma *v.* Atkinson, 313 U. S. 508, 527-528.

[12] South Carolina *v.* Georgia, *supra;* Scranton *v.* Wheeler, *supra;* Arizona *v.* California, *supra*, 451-452.

rested entirely upon the conclusion that respondent's property had been taken by "filling and closing Mason Creek", and since all of respondent "riparian rights" were subordinate to the government's power to close the stream, the judgment is

*Reversed.*

Mr. Justice ROBERTS is of the opinion that the judgment should be affirmed for the reasons stated in the opinion of the Circuit Court of Appeals, 143 F. 2d 721.

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